No. 79-486

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES STEEL CORPORATION AND YOUNGSTOWN SHEET AND TUBE COMPANY, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1979. The petition for a writ of certiorari was filed on September 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the determination of the Administrator of the Environmental Protection Agency that good cause existed to promulgate air quality nonattainment designations without prior notice and opportunity for comment.

2. Whether the court of appeals properly applied the standards for judicial review under the Clean Air Act in finding that the alleged procedural error of the Administrator of the Environmental Protection Agency was not sufficient to require reversal of the agency's air quality nonattainment designations.

STATEMENT

In the Clean Air Act Amendments of 1970 (Pub. L. No. 91-604, 84 Stat. 1676), Congress directed that the national ambient air quality standards established under Section 109, 42 U.S.C. 7409,[1] be attained throughout the country by mid-1975. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). However, in considering the 1977 amendments to the Act, Congress became aware that those standards still had not been achieved in many areas of the country. This failure was attributed to inadequate restrictions for certain sources of pollution, insufficient enforcement of those restrictions, and noncompliance by the pollution sources. In particular, Congress took note of the steel industry's especially poor compliance record. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 207, 210-211 (1977).

As a result of this widespread failure to meet the original statutory deadline, Congress, in the 1977 amendments, adopted a new regulatory approach. The first step was to identify all areas where the air quality was below the applicable standards and to designate those areas as "nonattainment areas." Section 107(d), 42 U.S.C.

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[1]The Clean Air Act (formerly 42 U.S.C. 1857 *et seq.*) is now codified as 42 U.S.C. (Supp. I) 7401 *et seq.* See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. In this Brief in Opposition, citations will refer to the current codification of the Clean Air Act, as amended.

7407(d). Each state was required under Section 107(d)(1) to assess its air quality and to submit proposed area designations to the Environmental Protection Agency (EPA) by December 5, 1977. Pursuant to Section 107(d)(2), the Administrator of EPA was to review each state's proposed designations and promulgate a final list, with any modifications he deemed necessary, by February 3, 1978. For the designated nonattainment areas, the 1977 amendments require that pollution restrictions be imposed to ensure attainment of the standards as expeditiously as possible. Sections 171-178, 42 U.S.C. 7501-7508.

On March 3, 1978, the Administrator published the list of area designations for the entire country. 43 Fed. Reg. 8962 (Pet. App. A21-A33). Overall, more than 1,300 counties were designated as nonattainment areas for one or more pollutants (*id.* at A30). In particular, the Administrator approved the State of Indiana's designation of portions of Lake County (Gary and East Chicago, Indiana) as a sulfur dioxide (SO_2) nonattainment area (*id.* at A32).

The nonattainment designations were made immediately effective without an opportunity for prior notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. 553(b) and (d). The Administrator determined that the tight statutory schedule of the amendments made it impracticable and contrary to the public interest to postpone the effective date of the designations (Pet. App. A23). Accordingly, the Administrator concluded that good cause existed under the APA to promulgate the designations to be effective immediately (*ibid.*). In addition, the Administrator solicited public comment on the designations for 60 days and committed the agency to revise the designations as appropriate in light of those comments (*ibid.*).

Petitioners sought judicial review of the designations in the court of appeals under Section 307(b)(1), 42 U.S.C. 7607(b)(1). Thereafter, the court granted EPA's motion to stay proceedings pending the agency's consideration of public comments. On October 5, 1978, the Administrator issued a revised list of designated nonattainment areas. 43 Fed. Reg. 45993, 46007-46008 (Pet. App. A34-A42). While modifying the designations with respect to some areas (including several in Indiana), the Administrator affirmed the original designation of Lake County as a sulfur dioxide nonattainment area. He concluded that since violations of the primary air quality standard had been measured in the industrialized section of the County, a nonattainment designation was required. See Section 171(2), 42 U.S.C. 7501(2).

The court of appeals affirmed EPA's nonattainment designation for Lake County, finding that petitioners' procedural and substantive challenges were without merit (Pet. App. A1-A20). The court held that the "legislative scheme" of the 1977 amendments (*id.* at A7), and particularly the "series of tight statutory deadlines" (*ibid.*), the "time-consuming process" of developing revised state plans for designated nonattainment areas (*id.* at A7-A8), and the "adverse impact on health that any further delays would entail" (*id.* at A10), gave the Administrator good cause under the APA to dispense with prior notice and comment and to make the designations immediately effective. The court also noted that the problem of delay had been compounded by the failure of some states to meet their deadlines for submitting proposed designations to EPA (*id.* at A9). Finally, throughout its opinion, the

court stressed the clear congressional intent in the 1977 amendments that the air quality standards be attained "as expeditiously as practicable" (*e.g.*, *id.* at A7-A8, A13).[2]

In addition, the court observed in dicta (Pet. App. A12-A15) that, even if good cause did not exist, invalidation of the Secretary's action was not warranted under Section 307(d)(9) of the Clean Air Act, 42 U.S.C. 7607(d)(9). The court explained that Section 307(d)(9) was designed to limit judicial review of EPA rulemaking in order to avoid "endless litigation over technical and procedural irregularities" (*id.* at A13). The court found that Section 307(d)(9) extended to the designation of nonattainment areas either as an action by the Administrator promulgating an implementation plan or significant deterioration regulations (*id.* at A14 n.12) or as one of the general EPA rulemaking actions intended by Congress to be covered by the judicial review provisions of the 1977 amendments (*id.* at A14). Applying Section 307(d)(9) to the procedural errors alleged by petitioners, the court concluded that "none of the prerequisites for reversal have been satisfied" (*ibid.*).[3]

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[2]The court specifically declined to follow decisions of the Third and Fifth Circuits holding that the Administrator did not have good cause under the APA (Pet. App. A8-A9 n.5, A9 n.7, A10-A11 n.10, A11-A12 n.11, A15 n.14). Moreover, the Seventh Circuit panel circulated its opinion among all judges of the court in regular service, and a majority did not favor rehearing *en banc* on this difference among the circuits (*id.* at A13 n.11).

[3]The court also dismissed petitioners' substantive challenge to the Lake County nonattainment designation. This issue is not presented as a reason for granting the petition.

ARGUMENT

1. Petitioners correctly note (Pet. 8-17) that the Seventh Circuit decision in this case, in sustaining the Administrator's determination of good cause under the APA, is in conflict with the decisions of the Third Circuit in *Sharon Steel Corp.* v. *EPA*, 597 F. 2d 377 (1979) (Pet. App. A75-A84), and of the Fifth Circuit in *United States Steel Corp.* v. *EPA*, 595 F. 2d 207 (1979) (Pet. App. A85-A101).[4] However, in the circumstances presented here, such a conflict does not warrant review by this Court.

The statutory scheme of the 1977 amendments to the Clean Air Act confronted EPA with a unique situation. The express purpose of the amendments was to remedy the past failure to meet the national ambient air quality standards and to ensure that those standards would be achieved "as expeditiously as possible." The amendments established a regulatory process, governed by a series of very tight statutory deadlines, in which each subsequent step was triggered by completion of the prior step. See Section 107(d)(1)-(2), 42 U.S.C. 7407(d)(1)-(2), and Pub. L. No. 95-95, Section 129(c), 91 Stat. 750, 42 U.S.C. (Supp. I) 7502 note. The first step in the process—identification and designation of nonattainment areas—needed to be completed quickly so that the states would have the maximum opportunity to accomplish the more complicated and lengthy second step—the development and adoption of revised implementation plans, which under the statute were required to be submitted by January 1, 1979. Section 129(c) of Pub. L. No. 95-95, 91

[4]This question is also pending in cases before the District of Columbia and Sixth Circuits. See *State of New Jersey* v. *EPA*, No. 78-1392 (D.C. Cir.), and *Columbus & Southern Ohio Electric Company* v. *Costle*, No. 78-3197 (6th Cir.), and related cases.

Stat. 750, 42 U.S.C. 7502 note. The Administrator assessed the need to adhere to the statutory deadlines and the importance of avoiding any further postponements in attaining the air quality standards, and on that basis he determined that there was good cause to make the nonattainment designations immediately effective without the delay that would be entailed by advance notice and comment (Pet. App. A23). However, in order to obtain the views of the public, the Administrator requested the submission of comments for 60 days following promulgation of the designations (*ibid.*). This procedure ensured that necessary changes in the original designations could be made before the states completed the plan revisions. It also assured that changes could be made before new pollution restrictions were imposed on any source.

Under the 1977 amendments, there is no longer any need to promulgate additional nonattainment designations that would be immediately effective; the critical time period covered by these statutory provisions has passed. Of course, in accordance with the definition set out in Section 171(2), 42 U.S.C. 7501(2), EPA continues to revise its nonattainment designations on the basis of changed circumstances and new information. However, these re-designations are not subject to the stringent deadlines of Sections 107(d)(1)-(2), and are promulgated after prior notice and opportunity for public comment.[5] In short, the unique statutory circumstances that created the practical need to promulgate the original designations without prior notice and comment no longer exist, and the issue presented in the petition will not recur.

[5]Proposed designations and the agency's review of comments and final action are now routinely published. See 44 Fed. Reg. 2617 and 24845 (1979); 44 Fed. Reg. 15743 and 53081 (1979); 44 Fed. Reg. 19212 and 53081 (1979); 44 Fed. Reg. 19213 and 41782 (1979).

Moreover, this is not a situation in which a conflict in the circuits poses problems of inconsistent compliance obligations for petitioners.[6] The nonattainment designations and consequent pollution restrictions are set in each state rather than on a regional or national basis. That the nonattainment designations are made in some states after notice and public comment, while in other states the designations are made immediately effective subject to subsequent public comment, does not raise for petitioners the risk of inconsistent legal requirements that usually results from a conflict in the circuits.[7]

Given that the pertinent statutory periods have now passed and that petitioners are not subject to divergent compliance responsibilities, we submit that review by this Court is unwarranted.[8]

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[6]We note that the relief afforded by the Third Circuit was limited to the two companies involved in that proceeding (Pet. App. A83-A84) and therefore does not affect petitioners.

[7]Any burden resulting from the conflict in the circuits falls upon the EPA, which did not petition for a writ of certiorari in either the Third or the Fifth Circuit cases.

[8]Petitioners also argue that the Seventh Circuit's decision is "clearly erroneous" (Pet. 17). Their claim apparently rests on the mere fact that the Seventh Circuit found good cause while the Third and Fifth Circuits did not. That does not establish either that the Seventh Circuit did not properly review EPA's actions or that the court's decision is clearly erroneous. On the contrary, the Seventh Circuit fully reviewed all of the factors considered by the agency in reaching the decision to make the designations immediately effective (Pet. App. A2-A12). The Seventh Circuit also reviewed the changes in the designations made by EPA in response to public comments, and found that the agency was "clearly willing to consider, fully and objectively, all comments" (*id.* at A15). Accordingly, the Seventh Circuit concluded that there was "no reason to believe" (*ibid.*) that prior notice and comment would have altered the result. In contrast, neither the Third nor the Fifth Circuits weighed all the factors before

2. After sustaining the Administrator's determination that good cause existed under the EPA to dispense with prior notice and public comment, the Seventh Circuit went on to observe (Pet. App. A12-A15) that in any event the technical deviation from APA procedures alleged by petitioners would not be sufficient, under the judicial review provisions of Section 307(d)(9) of the Clean Air Act, 42 U.S.C. 7607(d)(9), to reverse the Administrator's nonattainment designations. Petitioners contend (Pet. 13) that "[t]he decision of the Seventh Circuit regarding the applicability of 42 U.S.C. 7607(d)(9) causes uncertainty in pending and future [EPA] rulemaking * * *." However, the Seventh Circuit's discussion on the proper interpretation of Section 307(d)(9) was clearly dicta, since the court had previously found that there was good cause under the APA for the Administrator's action, and hence the outcome of the case was not affected by the Seventh Circuit's observations in this regard. Moreover, neither the Third nor the Fifth Circuits had considered the applicability of Section 307(d)(9) (Pet. App. A15 n.14), and therefore no conflict among the circuits is presented.

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the Administrator. For example, they failed to recognize that EPA reviewed or made 1300 county nonattainment designations (*id.* at A30) and modified over 300 designations proposed by the states (43 Fed. Reg. 8962-9057 (1978)). Such considerations clearly undermine the Third Circuit's conclusion that "the state's submission was likely to constitute the final rule" (Pet. App. A81) and that therefore EPA could have received prior public comments without disregarding the deadlines imposed by the 1977 amendments. The Third and Fifth Circuits also ignored the delay caused by late state submissions (*id.* at A9). The Seventh Circuit, after careful consideration of the earlier opinions, declined to follow the decisions of the Third and Fifth Circuits. As the latest and most complete analysis of the issue, the Seventh Circuit's decision represents, we submit, the correct resolution.

There will be time enough after the courts of appeals have construed Section 307(d)(9) for this Court to consider the issue in a case in which it is squarely and directly raised.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

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[9]We note that this issue was not briefed or argued by the parties in the court below (Pet. 7).

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